IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE SIDE

WRIT PETITION NO.9164 OF 2003

Gundurao Shivsharanappa Patil ...Petitioner

Vs.

Shivsherhappa Veerbhadrappa Patil
and others ...Respondents

Mr.A.R.S.Baxi for the Petitioner
Mr.V.N.Tayade for the Respondent Nos.1, 3 to 6.

CORAM: A.S.OKA, J.
DATED: JANUARY 27,2006.

P.C.:

1. By order dated 17th December 2003 this Court issued notice for final disposal at admission stage. Accordingly, I have taken up the Petition for final hearing forthwith. I have heard the learned Counsel for the Petitioner and the learned Counsel for Respondent Nos.1, 3 to 6. Office noting shows that the Respondent No.2 is duly served with the notice.

2. In this Petition under Article 227 of the Constitution of India, the challenge is to the order dated 7th January 2002 passed by the learned Trial Judge in Regular Darkhast No.19 of 1998. The present Petitioner is the decree holder who has filed the said Darkhast. With a view to appreciate the submissions made by the Advocates for the parties, a reference will have to be made to the facts of the case in brief.

3. The present Petitioner filed R.C.S.No.27 of 1971 for partition and separate possession. The suit was decreed. The decree passed in the suit has attained the finality. A final decree Application was filed by the Petitioner for separate possession of his 1/6th share and the said Application was allowed. On the basis of the final decree passed, Regular Darkhast No.19 of 1998 was filed by the Petitioner. During the pendency of the proceedings, the Petitioner's mother expired on 04th November, 1985. It is the case of the Petitioner that his mother had executed a Will in his favour by which she bequeathed her undivided share in the joint family property awarded under the final decree in the partition suit. The present Petitioner filed a Misc. Application for probate in respect of the said Will. The Trial Court granted the Probate in favour of the Petitioner. The present Respondent preferred an Appeal in the District Court for challenging the grant of probate in favour of the Petitioner. The Appeal was dismissed by the said Court. The Respondents preferred Second Appeal No.203 of 2001 in this Court which has been admitted for final hearing. In the said Second Appeal, Civil Application No.957 of 2001 was filed by the Respondent for stay of the further proceedings of R.C.S.No.19 of 1998. The said Application was disposed of by the learned Judge by order dated 5th November 2001 by observing that the execution of the decree shall be subject to the result of the Appeal and the Respondents will not create any third party interests in respect of the suit

property.

4. An Application was made on 5th January 2002 by the Petitioner in R.D.No.19 of 1998 pointing out that the stay to the execution proceedings was not granted by this Court and therefore, the execution proceedings should proceed further. On the said Application, by passing the impugned order, the learned Judge held that considering the order passed by this Court in Civil Application No.957 of 2001, it is not just and proper to proceed with the execution proceedings without direction of the High Court. He, therefore, directed that the execution proceedings will stand stayed till further orders.

5. The learned Counsel for the Petitioner submitted that the prayer specifically made by the Respondent in the pending Second Appeal was for stay of the execution proceedings and the said prayer was rejected by this Court and therefore, there was no occasion for executing court to stay further proceedings. The learned Counsel for the Respondent Nos.1 and 3 to 6 submitted that while deciding the Application for stay made by the Respondents, this Court observed that the execution of the decree shall be subject to the result of the Second Appeal and therefore, the learned executing court was right when it came to the conclusion that the execution proceedings should not proceed further. He, therefore, submitted that no interference is called for.

6. I have considered the submissions. The prayers made by the Respondents in the Civil Application No.957 of 2001 read thus:

"(a) the pending hearing and final disposal of the Second Appeal No.203 of 2001 the Respondent be restrained by no order of injunction from proceeding the Darkhast No.19 of 1998;

(b) alternatively pending hearing and final disposal of the Second Appeal No.203 of 2001, the further proceeding of the Darkhast No.19 of 1998 pending on the file of the C.J.J.D., Akkalkot be kindly stayed."

This Court passed the following order while disposing of the said Civil Application :

. "Heard parties.

. Execution of Decree shall be subject to the result of this Appeal. However, during the pendency of the Appeal respondent shall not create any third party interests with respect to the suit property."

7. Thus, it is crystal clear that this Court did not grant

the prayer made by the Respondents for stay of the proceedings of R.D.No.19 of 1998. All that this Court observed was that the steps in the execution proceedings will be subject to the final outcome of the Appeal and even if the present Petitioner gets the property in execution proceedings, he will not create any third party interests in respect of the property till the disposal of the Second Appeal. Thus, the order of stay was not at all warranted and deserves to be set aside. The Petition, therefore, must succeed.

8. Hence, I pass the following order :

i) The impugned order dated 7th January 2002 is quashed and set aside.

ii) The executing court will proceed with the R.D.No.19 of 1998 in accordance with law. However, it is made clear that the parties will bound by the order passed in C.A.No.957 of 2001 in Second Appeal No.203 of 2001.

iii) Petition is accordingly allowed with no order as to costs.

. Parties and the concerned Court to act upon an authenticated copy of this order.

Judge.